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In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNUP AND SIMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit entered in this case on August 22, 1963.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-25) is reported at 322 F. 2d 57. The findings of fact, conclusions of law, and order of the Board (R. 61-81)[1] are reported at 137 NLRB 766.

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[1] "R." refers to Volume I, Transcript of Record, filed in the court of appeals; "J.A." refers to portions of the testimony and exhibits printed in a joint appendix filed therein. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1963, and a decree was entered on November 14, 1963 (App. A, *infra*, pp. 11, 26-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer abridges employee rights, in violation of the National Labor Relations Act, where he discharges employees whom he knows are engaged in solicitation for union membership under a good faith but mistaken belief that, as part of such activity, they engaged in misconduct which would warrant their discharge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in App. B, *infra*, pp. 29-30.

STATEMENT

A. The Board's Decision and Order

The Board found that on September 21, 1961, approximately 19 of respondent's truckdrivers[2] staged a walkout in support of a demand for a wage in-

[2] Respondent is engaged in the manufacture, sale and installation of concrete, concrete blocks, ready-mixed concrete, and related products. The events herein occurred at the Company's plant in Melbourne, Florida. (R. 34; J.A. 8).

crease; that the leaders in this activity were employees Robert J. Davis, Joseph H. Harmon and John P. McKnight; that the men returned to work after plant manager Carl Moritz assured them wage increases would be forthcoming within 30 days; and that thereafter, on September 29, 1961, respondent laid off Davis, Harmon, and McKnight in retaliation for their role in the concerted activity and to discourage such activity in the future, thereby violating Section 8(a)(1) of the Act (R. 62-63).

After their layoff, Davis and Harmon actively engaged in efforts to organize the employees on behalf of the Union,[3] calling upon employees at their homes (R. 72; J.A. 28, 40, 50-51). On October 13 or 14, 1961, Plant Superintendent Tawney was approached by employee Pate and told that Harmon and Davis, while soliciting him to sign a union authorization card, had made threats against Company property. According to Tawney, Pate stated that Harmon and Davis warned that "if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work;" it would be fixed by "using dynamite on the silos, the storage silos" (R. 41; J.A. 160, 180-181). Tawney reported his conversation with Pate to Moritz (R. 41-42; J.A. 96, 160).

On November 8, 1961, Moritz sent identical letters to Davis and Harmon, which read as follows (R. 71; J.A. 195, 196):

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[3] Local Union No. 172, Airline Supply Technicians, affiliated with International Brotherhood of Teamsters (R. 34).

> When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have "first call" on any job that came available once business picked up.
>
> Business is now picking up, but I regret to advise you that I cannot re-employ you.
>
> It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company.

At the Board hearing, both Davis and Harmon denied that they had made any threats to Pate. Harmon said he had visited Pate once, alone, to obtain his signature on an authorization card. Davis testified that he never visited Pate (R. 43; J.A. 32, 40, 63, 64). The Company did not call Pate to testify, although admitting that he was present at the hearing (J.A. 99, 166).

On the basis of the foregoing, the Board concluded that Davis and Harmon had not engaged in the misconduct alleged, and that, by changing their status from layoff to permanent discharge, the Company violated Sections 8(a)(3) and (1) of the Act. The Board found that the alleged misconduct was only a pretext for penalizing Davis and Harmon because of their union activity.[4] The Board added that, even if the

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[4] The Board stated (R. 74):

> It is undisputed, and Respondent knew, that the alleged misconduct was asserted to have taken place while Davis and Harmon were engaged in protected union activity, the solicitation of union membership and

Company believed in good faith that they had engaged in misconduct, such a good faith belief would not privilege the discharges since it affirmatively appeared that no misconduct had in fact ocurred (R. 73-74).[5]

The Board's order (R. 76-79), *inter alia*, required the Company to cease and desist from the unfair labor practices found, to offer Davis and Harmon reinstatement, and to make them whole for any loss of pay resulting from the discrimination.

B. The Decision of the Court of Appeals

The court of appeals held that there was substantial evidence to support the Board's finding that the layoffs of September 29, 1961, were discriminatorily motivated, in violation of Section 8(a)(1) of the Act, and enforced the part of the Board's order relating thereto (App. A, *infra*, pp. 13, 15, 25). However, the court declined to sustain the Board's finding that the discharge of Harmon and Davis violated Section 8(a)(3) and (1) of the Act. The court, accepting the Board's finding that Harmon and Davis had not

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authorization cards. In view of this knowledge and in view of the fact that these employees were laid off discriminatorily because of Respondent's desire to rid itself of employees who it knew were leaders in the protected concerted activity, we can only conclude that, because of their union activity, Respondent seized up-[on] their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges.

[5] In this respect, the Board applied the principle enunciated in *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, enforcement denied, 203 F. 2d 486 (C.A. 5).

in fact engaged in misconduct but concluding that the Company in good faith thought that they had,[6] held that, since the employer's motive was not discriminatory, the discharges were not unlawful. The court stated (App. A, *infra*, pp. 18-19):

> Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation of the Act if the employer's motivation was not discriminatory. * * * In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the place of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.[7]

REASONS FOR GRANTING THE WRIT

As the court below acknowledged (App. A, *infra*, pp. 22-23), its holding that an employer does not violate the Act where he discharges employees whom he knows to be engaged in concerted activity under a good faith, but mistaken, belief that as part of that activity they engaged in misconduct is in direct conflict with *National Labor Relations Board* v. *Indus-*

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[6] The court thus in effect rejected the Board's alternative finding that the misconduct was only a pretext for the discharges (see *supra*, p. 4). The propriety of this action is not questioned here.

[7] The Court's holding is in accord with its earlier decision in *Rubin Bros. Footwear, Inc.* v. *National Labor Relations Board*, 203 F. 2d 486 (Rives, J., dissenting).

trial Cotton Mills, 208 F. 2d 87, 89-93 (C.A. 4), certiorari denied, 347 U.S. 935, and *National Labor Relations Board* v. *Cambria Clay Products Company*, 215 F. 2d 48, 53-54 (C.A. 6). In *Industrial Cotton*, the employer denied reinstatement to an unreplaced economic striker under the good faith, but mistaken, belief that he had thrown tacks on the street in front of the plant. The Fourth Circuit, accepting the Board's finding that the striker was innocent of the misconduct, agreed that the denial of reinstatement was violative of Sections 8(a)(1) and (3) of the Act, irrespective of the employer's "good" motive.[8] In *Cambria Clay*, the Sixth Circuit reached the same conclusion in a similar situation.

The decision below is also in conflict with *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3), which held that the employer violated the Act by discharging an employee under an honest, but erroneous, belief that he had deliberately lied about the extent of the employer's profits in reporting to a union committee about preparations for a Board election.[9]

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[8] The court below recognized (App. A, *infra*, p. 22) that no meaningful difference can be drawn between the instant case and *Industrial Cotton* on the ground that "the latter involved a strike and the former involves solicitation for union membership."

[9] The court below (App. A, *infra*, p. 23) sought to distinguish *Cusano* on the ground that "there was nothing to substantiate the claim that the employer had a good faith belief that the employee had done the misdeed." However, the opinion in *Cusano* reveals that the employer had secured his information about the alleged distortion of profits from

The decision in *Industrial Cotton*, rejected by the court below, was cited with approval in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45 at n. 53; *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 680 (concurring opinion), and *National Labor Relations Board* v. *Erie Resistor Corporation*, 373 U.S. 221, 229 at n. 8. The context of its citation indicates the error in the ruling of the court below that the discharge here was not a violation of the Act unless shown to have been motivated by a specific intent to discourage union activity. Thus, in *Radio Officers* the Court recognized that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership and that an employer's protestation that he did not intend to encourage or discourage must be unavailable where a natural consequence of his action was such encouragement or discouragement (347 U.S. at 45). The Court cited *Industrial Cotton* as one of the cases in which "the courts have recognized that proof of certain types of discrimination satisfies the intent requirement" (*ibid.*). In his concurring opinion in *Local 357, Teamsters*, Mr. Justice Harlan referred to *Industrial Cotton* and *Cusano* v. *National Labor Relations Board, supra*, for the proposition, also pertinent here, that an "ab-

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several employees who had been present at the committee meeting (190 F. 2d at 900), which is at least as substantial a basis for a "good faith" belief as that which existed here. Moreover, the court in *Cusano* assumed that the employer had a good faith belief, but concluded that it was irrelevant (190 F. 2d at 902).

sence of a significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation * * *" (365 U.S. at 680). There can be no doubt that the employer's action here in discharging the employees who were leading the drive for union recognition in the mistaken belief that they had engaged in misconduct as part of that activity will necessarily tend to discourage the exercise of union activity in the future.

The problem presented in this case is a constantly recurring one in the administration of the Act,[10] and can arise whenever employees undertake to strike or engage in other concerted activity. Accordingly, and because the effective exercise of Section 7 rights requires that the ambit of the protection afforded the employee be clearly delineated, it is important that the conflict among the circuits upon this question be resolved by this Court.

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[10] In addition to *Rubin Bros.*, cited in n. 5, supra, see also, *e.g., Stewart Hog Ring Co., Inc.*, 131 NLRB 310, 313, 336 (1961); *Bonnar-Vawter, Inc.*, 129 NLRB 127, 138 (1960); *Hill & Hill Truck Line, Inc.*, 120 NLRB 101, 102, (1958); The *Patterson-Sargent Co.*, 115 NLRB 1627, 1631, 1666, 1674-1675. (1956); *Fry Products, Inc.*, 110 NLRB 1000, 1004 (1954); *Longview Furniture Co.*, 100 NLRB 301, 305 (1952); *Porto Rico Container Corp.*, 89 NLRB 1570, 1575-1576 (1950).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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November 1963

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20117

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

BURNUP AND SIMS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

(August 22, 1963.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

JONES, Circuit Judge: The National Labor Relations Board here petitions this Court to enforce its order against the respondent, Burnup and Sims, Inc. 137 N.L.R.B. 766.

The respondent was engaged in the manufacture, sale and installation of concrete products on September 20, 1961, when nineteen of respondent's employees, most of whom were truck drivers, held a meeting near one of respondent's plants and discussed wages. Selecting Robert Davis their spokesman, the employees decided to ask for a 15-cent an hour wage increase. On the next morning they made such a re-

quest to the plant superintendent, Doyle Tawney. When the plant manager, Carl Moritz, arrived the superintendent informed him that the men refused to work unless they were given a raise. Moritz said to assemble them in a warehouse nearby. On being assembled, the men, speaking through Davis, reiterated their demand for a 15-cent raise. As found by the Trial Examiner and adopted as a fact by the Board, employee Harmon "conspicuously align[ed] himself with Davis" during their discussion. The meeting bore no fruit and Moritz asked the employees to return to work. They refused and instead went in front of the warehouse to discuss the matter further among themselves. Davis and another employee, John McKnight, left in McKnight's car to contact a union representative. They were unsuccessful and returned to the meeting where Moritz was addressing the men who were still assembled in front of the warehouse. Prior to their return, Harmon and several others had asked questions concerning the wage increase. Davis reassumed the leadership of the group after he got back and the meeting finally ended with Moritz promising the increase within thirty days. Thereafter, the men returned to work. That evening Moritz asked McKnight if he would have gone through with what he had started that morning. After ascertaining that Moritz was referring to the walkout McKnight replied, "Yes, my father told me once I made my play to follow it through and I had made my play."

On September 22, 1961, Davis contacted the president and vice president of Local 172 of the Airline Supply Technicians (affiliated with the Teamsters Union) and was told to find out whether a substantial number of employees were interested in the union.

Three days later, Moritz told Tawney that he intended to grant pay increases and that he would have to reduce his working force. He asked Tawney for a list of employees to be considered for layoff.

On September 29, 1961, McKnight, Davis and Harmon were laid off. The names of seven men were brought up as possibilities and these three were picked for reasons, according to Moritz and Tawney, other than their labor activities. However, the Board found, overruling the Trial Examiner, that the layoffs were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. The true ground, according to the Board, was the prominent part these three had played in the walkout. Suffice it here to say that taking the record as a whole, we cannot say that this finding is not supported by substantial evidence. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

On October 1, 1961, wage increases were put into effect, ranging from five to fifteen cents an hour, for all the employees in that operation. Moritz had been authorized by the home office prior to the walkout to grant raises of five cents an hour across the board. However, up until October 1, he had not done so.

The events which we regard as essential in reaching our decision occurred after the layoffs. On October 13 or 14, 1961, Tawney was approached by employee Pate and told that Harmon and Davis, while soliciting him to sign a union authorization card, had made threats against company property. Tawney testified that Pate told him that Harmon actually made the threatening remark with Davis standing by. Tawney testified,

"And during the course of the conversation they made the statement that if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work.

"Q. It would be fixed so no one could work? A. By using dynamite on the silos, the storage silos."

When Tawney reported his conversation with Pate to Moritz, the latter said "we have really got trouble." On October 25, 1961, Pate signed a sworn statement to the same effect, except that he attributed the remarks to Davis, rather than to Harmon. However, again he said that Harmon and Davis were together when the remarks were made.

On November 8, 1961, Moritz sent identical letters to Davis and Harmon which read as follows:

"When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have 'first call' on any job that came available once business picked up.

"Business is now picking up, but I regret to advise you that I cannot re-employ you.

"It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company."

Neither Harmon nor Davis made any attempt to correct the respondent concerning the letters of discharge. At the hearing before the Trial Examiner, both Davis and Harmon denied that they had made these threats to Pate. Harmon said he had visited

Pate once, alone, to get his signature on an authorization card. Davis testified that he never visited Pate. Each denied ever having made these statements or the other having made them in his presence. Pate did not testify.

In order to complete this brief resume of the facts, we shall finish the McKnight story. He was subsequently taken back as a truck driver and eventually dismissed for cause. The Board did not order that respondent reinstate him but simply that he be made whole for the wages lost between the time of his discriminatory layoff and recall. With this we agree.

As for Davis and Harmon, the Board found that respondent had violated Section 8a(3) and (1) of the Act in discharging them and ordered their reinstatement with back pay from the time of their layoff on September 29, 1961. As before noted, the Trial Examiner held that the General Counsel had failed to prove the illegality of both the layoffs and the discharges and recommended that the complaint be dismissed.

There are three issues in the case. First, whether there is substantial evidence supporting the Board's finding that the layoffs were discriminatorily motivated. As we pointed out in the recital of the facts, the record taken as a whole contains sufficient evidence to uphold the Board's finding. The other two issues raise questions of law. We are to decide whether an employer can dismiss an employee on the belief held in good faith that he has engaged in serious acts of misconduct or disloyalty, even though the alleged misconduct occurred during a time when the employee was engaged in activity protected by the Act. The Board found as a fact that the threats were not made. Therefore we must decide the belief as being in good faith, but mistaken. The third issue

involves the inclusion of the period between the Trial Examiner's report and its reversal by the Board in the computation of back pay. Our resolution of the first of these two issues renders a decision on the other unnecessary.

In its opinion, the Board relies on *Rubin Bros. Footwear, Inc.*, 99 N.L.R.B. 610, order vacated and set aside, 5th Cir. 1953, 203 F. 2d 486, holding "that, when in the course of protected activity, employees are accused of misconduct and a respondent takes action affecting their employment tenure based on a belief that the employee has engaged in misconduct, such an honest belief would be an adequate defense to a charge of discrimination for refusing to reinstate such employee *unless it affirmatively appears that such misconduct did not in fact occur*. 137 N.L.R.B. 766, 772-73 (Emphasis in original). Crediting the denials of Harmon and Davis and noting that Pate had not testified nor had any attempt been made to use his affidavit as proof of the truth of the statements made therein, the Board found such affirmative proof. The resolution of this issue turns on whether the italicized words from the Board's opinion state a sound and controlling rule.

The respondent relies on this Court's disposition of Rubin's on appeal. In that case one Rawlins, who had allegedly been discriminatorily discharged for protected activity, was standing at the entrance of the employer's establishment with a group of fellow strikers. When two nonstriking employees approached to go to work, they were beaten by members of the group. One of them told the company that Rawlins had struck him. But the Board found that this was not true and ordered Rawlins' reinstatement. This Court vacated this order on the ground that "whether he did or did not strike a blow, he was, under the

undisputed testimony and in the sense of criminal participation, aiding and abetting in the fight." 203 F. 2d 486, 488. In its discussion, however, the Court stated a principle which we apply in this case. There the Court said:

> "But over and above all this, there is a fatal defect in the finding of examiner and board that, even if the employers in good faith believed, as the undisputed evidence shows, and even the board concedes they did, that Rawlins was a brawler, and discharged him in good faith because they so believed, and not for his union activities, the discharge could be held discriminatory unless the employer assumed and discharged the burden to the satisfaction of examiner and board that the belief was well founded, that is that Rawlins had in fact struck a blow as Odum claimed.
>
> "This court, and we think, all other courts have held to the contrary. If anything is settled in labor law and under the act, we think it is that membership in a union does not guarantee the member against a discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity. The board is without power, as it seems to have undertaken in this and in some other of its decisions to do, to lay down a rule to the contrary." 203 F. 2d 486, 487-88.

We so hold. If the employer can establish that he had a good faith belief that an employee has engaged in misconduct such as here, it need not appear that the alleged misconduct in fact occurred. The burden of proving that an employer has discouraged union membership by discrimination in regard to terms and

conditions of employment is on the General Counsel, *N.L.R.B.* v. *Ray Smith Transport Co.*, 5th Cir. 1951, 190 F. 2d 142. Moreover he must show, not that the employer's activity tended to discourage union membership, but that there was discrimination against an employee motivated by a desire to discourage protected activity. See the concurring opinion of Mr. Justice Harlan in *Local 357, Teamsters Union* v. *N.L.R.B.*, 365 U. S. 667, 678-80, 81 S. Ct. 835, 6 L. Ed. 2d 11. This is not a case such as *Radio Officers' Union* v. *N.L.R.B.*, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455, where the Supreme Court stated that "an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established" 347 U. S. 17,45. In that case the employer had given wage increases and other benefits to union members but had declined to do so for nonunion employees. The union was the sole bargaining representative for the plant. The employer defended its action on the ground that it was merely responding to union pressure and had no intent to encourage unionism. Furthermore, it claimed, this action could not have the effect of encouraging union membership, because the union was closed and the nonmembers could not get in if they wished. This decision points up the importance in this type of case of the motive of the employer. Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation

of the Act if the employer's motivation was not discriminatory. Wage and benefit differentials inherently encourage; a discharge does not inherently discourage. The difference is crucial. In the latter situation, motivation is determinative; in the former it is irrelevant. In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.

Nor do we feel that the rationale of *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372, applies. There the Court held, inter alia, that a nondiscriminatory no-solicitation rule as applied against employees soliciting for union members during the employees' free time in a plant whose personnel was widely scattered violated Section 8(a)(1) of the Act. It followed therefore that discharges made pursuant to such a rule violated Section 8(a)(3). "It seems clear" said the Court, "that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization." 324 U. S. 793, 805. The defense of the discharge there consisted of the invalid rules; without the rules there was no defense. Here on the other hand the defense is a bona fide attempt to protect company property.

The petitioner stresses *N.L.R.B.* v. *Local 1229, Int'l Bhd. of Elec. Workers*, 346 U. S. 464, 74 S. Ct. 172, 98 L. Ed. 195, as supporting its position. In that case ten striking television technicians were fired be-

cause of a handbill distributed to the public denouncing the quality of their employer and its programs. The handbills made no reference to the labor dispute. The Court held that where nine of the technicians were involved, their acts of disloyalty warranted their dismissal. However, as for the tenth who had not actually participated, the Court stated:

> "The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty. In the latter instances, this sometimes led to a further inquiry to determine whether their concerted activities were carried on in such a manner as to come within the protection of §7." 346 U. S. 464, 474-75.

The question here presented did not arise in the *Local 1229* case. No claim was presented to the Court that the tenth man should not have been reinstated. Moreover, the Court went on to say that "the legal principle that insubordination, disobedience or disloyalty is adequate cause for dismissal is plain enough. The difficulty arises in determining whether,

in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." 346 U. S. 464, 475. It is apparent that in this case the Court was thinking in terms of an employee discharged for a legitimate cause and one discharged for protected activities. The case is not in opposition to our holding. In fact we take the language last quoted as supporting our view. Here there was an honest belief that the employee had engaged in unprotected activity which warranted dismissal. The General Counsel cannot dispose of his burden by showing that the belief was erroneous; he must go further and show that the belief was not bona fide. The test for determining whether a discharge is wrongful under such circumstances as are presented by this case is the motive behind it. *N.L.R.B.* v. *Atkins Transfer Co.*, 6th Cir. 1955, 226 F. 2d 324. "What is vital is whether [a change in union prestige] results from discrimination and such discrimination had as its purpose encouraging or discouraging union membership." *N.L.R.B.* v. *Dalton Brick & Tile Corp.*, 5th Cir. 1962, 301 F. 2d 886, 896. Under this test the Board is not entitled to the enforcement of its order.

The Board relies on *N.L.R.B.* v. *Industrial Cotton Mills*, 4th Cir. 1953, 208 F. 2d 87, cert. den. 347 U. S. 935, 74 S. Ct. 630, 98 L. Ed. 1086. There a striking employee was taken into custody for throwing tacks on the road during the course of a strike but later released. The employer refused to reinstate him after the strike on the ground that he had engaged in this destructive and unprotected activity. It was found as a matter of fact that he had not thrown any tacks.

The employer resisted the Board's order on the ground that it had had an honest belief that the employee had behaved reprehensibly. The Court held, however, that the mistaken belief was no defense where the employee was engaged in admittedly protected activity and was in fact innocent of the charges for which he was discharged. There the Court said:

> "It is conceded by counsel for both Industrial and the Board that if Industrial had refused reinstatement to Stallings on the honest but mistaken belief that Stallings had been guilty of some crime, such as arson or robbery, entirely disconnected with the strike, the union or concerted activity of the employees, then the Board could not order his reinstatement. Such conduct is without the ambit and beyond the purview of the National Labor Relations Act (hereinafter called the Act), 29 U.S.C.A. § 151 et seq.
>
> "The question then remains whether the Board has the power to order the reinstatement of Stallings when his employer has refused reinstatement to him after the strike on account of the employer's honest but mistaken belief that Stallings had been guilty of *strike misconduct*. By the term 'strike misconduct' we mean, broadly, misconduct arising out of, developed by, or closely connected with, the strike. The Board, correctly we think, answered this question in the affirmative." 208 F. 2d 87, 90.

Perhaps the only material difference between this case and *Industrial Cotton, supra*, is that the latter involved a strike and the former involves solicitation for union membership. But we shall not strain the point by seeking a distinction in this difference. Both activities are protected. But likewise we cannot agree

with the distinction drawn in *Industrial Cotton* between unprotected activity related to that which is protected, and unprotected activity not so related. We believe that unprotected activity is unprotected. A good faith belief that the employee has engaged in it is sufficient reason to discharge him no matter what the circumstances. This does not mean that the circumstances may not indicate bad faith. And the fact that the employee was engaging in protected activity might be a factor in determining that the employer was not in good faith. But given the good faith in either context it is our view that the employer is at liberty to take such disciplinary measures as he finds appropriate. As we read the opinion in the *Industrial Cotton* case the court would sustain the employer in refusing reinstatement to one who was honestly but mistakenly believed to have been guilty of arson, unless the property burned was the dwelling or place of business of the employer and the discharged employee had been soliciting union membership. We are not willing to adopt a rule based upon such reasoning. Following *Industrial Cotton* is *N.L.R.B.* v. *Cambria Clay Products Co.*, 6th Cir. 1954, 215 F. 2d 48, which reaches the same result and adopts the reasoning of the *Industrial Cotton* case.

Two other cases are cited by the Board as sustaining its holding, In re *Cusano*, 3rd Cir. 1951, 190 F. 2d 898, and *Salt River Valley Water Users' Association* v. *N.L.R.B.*, 9th Cir. 1953, 206 F. 2d 325. In the *Cusano* case there was nothing to substantiate the claim that the employer had a good faith belief that the employee had done the misdeed, in this case lying to his fellow employees about the firm's profit figures.

There is, however, dicta in the *Cusano* opinion which may not be in accord with our holding. In assessing the argument made in the case that there

was no violation where the basis for the discharge was a reasonable belief that the employee had lied, the Court stated:

> "It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. . . . This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. The right of a union official or representative to inform his fellow employees of the proceedings at the Board's regional office is certainly one of the activities so protected. To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of the employees' protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge." 190 F. 2d 898, 902-03.

If, as the Court states, the employer can discharge an employee for no reason at all, it would seem that he could discharge him for a bona fide belief that he had a good reason. But, as we said before, this case is inapposite for the reason that there was no real substance to the claim of good faith.

In the *Salt River Valley Water Users* case, the employee had been discharged for protected activity. The employer contended that in good faith it believed that his acts justified dismissal. As the Court correctly held, the employer's good faith is immaterial "where the activity for which . . . [the employee] was discharged was actually protected by the Act." 206 F. 2d 325, 329. This situation is plainly different from the one here, where the reason for the dis-

charge was the honest belief that the employee had engaged in misconduct outside the protection of the Act.

The Board followed its decision in the *Rubin* case, 99 N.L.R.B. 610, buttressed primarily by the Fourth Circuit's *Industrial Cotton* opinion. If we were not disposed to follow the decision of this Court in the *Rubin* case as a precedent, we would apply the sound principles there stated, with the result that we do not enforce that portion of the Board's order requiring reinstatement of Davis and Harmon. We are of the opinion, and so hold, that Davis and Harmon should be made whole for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged. The Board's order is modified accordingly. As ordered by the Board, McKnight is entitled to be made whole for loss of pay. The Board's order will be modified, and as modified will be enforced.

MODIFIED AND ENFORCED.

DECREE

Before: Tuttle, Chief Judge, Jones, Circuit Judge, and DeVane, District Judge.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against the above-named respondent on June 25, 1962. The Court heard argument of respective counsel on May 8, 1963, and has considered the briefs and transcript of record filed in this cause. On August 22, 1963, the Court, being fully advised in the premises, handed

down its opinion granting the Board's order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that the Respondent, Burnup and Sims, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against its employees for engaging in concerted activities for their mutual aid or protection;

(b) Discouraging membership in Local Union No. 172, Airlines Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating in regard to their hire or tenure of employement or any term or condition of employment;

(c) In any other manner interferring with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through a representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities.

2. Take the following affirmative action which the Board found will effectuate the policies of the National Labor Relations Act (hereinafter called the Act):

(a) Make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them

during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled The Remedy.

(b) Post as its offices and plants in Melbourne, Eau Gallie, and Cocoa, Florida, copies of the notice attached hereto marked Appendix. Copies of said notice to be furnished by the Regional Director for the Twelfth Region (Tampa, Florida), shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, timecards, reports, social security payment records, and all other records and reports necessary to determine the amounts of backpay due under the terms of this Decree.

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree what steps Respondent has taken to comply herewith.

Entered: Nov. 14, 1963

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT layoff, discharge or otherwise discriminate against our employees for engaging in concerted activities for their mutual aid or protection.

WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS, affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS of AMERICA, or in any other labor organization of our employees by discharging our employees or otherwise discriminating in regard to their hire or tenure of employment or the terms or conditions of employment.

WE WILL make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain

collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collectible bargaining or other mutual aid or protection or to refrain from any or all such activities.

BURNUP AND SIMS, INCORPORATED
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 Case Street, Tampa 2, Florida, (Tel.: 223-4623) if they have any questions concerning this Notice or compliance with its provisions.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning

of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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